

FILED BY CLERK

MAR -4 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2009-0285
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LESLIE ANN GUARISCO,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200801003

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

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Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Leslie Ann Guarisco was convicted after a jury trial of third-degree escape. On appeal she contends the trial court erred by permitting the state to seek an enhanced

sentence based on her prior felony convictions because the state untimely filed its allegation of prior convictions and untimely disclosed evidence of those convictions. We affirm.

Factual and Procedural Background

¶2 In May 2008, a grand jury charged Guarisco with third-degree escape after she slipped out of her handcuffs and left a police substation following her arrest for a misdemeanor offense. Eighteen days before trial, the state filed an allegation that Guarisco had four historical prior felony convictions. Guarisco moved to strike the allegation as untimely for the purpose of sentence enhancement under A.R.S. § 13-604(P).¹ The trial court denied the motion, noting the state was only “two days short of the 20-day rule” and finding Guarisco had been given adequate notice of the state’s intent to allege historical prior felony convictions for sentence enhancement because of discussions at a previous settlement conference. Although we have not been provided with a transcript of the settlement conference, the parties agreed below that they had discussed at that time the possibility of an enhance

¶3 d sentence based on Guarisco’s prior felony convictions.

¶4 After a three-day trial, the jury found Guarisco guilty of escape. The state informed the court and Guarisco that it had not yet received full documentation of her

¹The Arizona criminal sentencing code has been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective “from and after December 31, 2008.” *Id.* § 120. We refer in this decision to the statutes as they were numbered at the time of the offense in this case. *See* 2007 Ariz. Sess. Laws, ch. 287, § 1 (former § 13-604); 2006 Ariz. Sess. Laws, ch. 148, § 2 (former § 13-702.01).

prior convictions from the Arizona Department of Corrections, but that it anticipated having that information before the sentencing hearing and intended to prove Guarisco's prior convictions at that time. The court set a sentencing hearing for July 27, 2009. On July 6, the state filed a notice of additional disclosure, stating it had provided Guarisco with "cop[ies] of prior felony conviction[s] from the Arizona Department of Corrections."

¶5 Guarisco renewed her motion to strike the state's prior-conviction allegation, arguing the state had not disclosed timely the evidence of her prior convictions. In the alternative, she requested that the state be precluded from presenting the evidence at a trial on her prior convictions. Before the trial court ruled on that motion, however, Guarisco stipulated to two of the prior convictions and the court sentenced her to an enhanced, mitigated, 2.25-year prison term.²

²The state correctly points out there is a discrepancy between the sentencing minute entry, which reflects a 2.25-year prison term, and the trial court's oral pronouncement of a 2.5-year sentence. Generally, the oral pronouncement of sentence controls. *See State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983). But we agree with the state that the court clearly intended to impose a 2.25-year prison term. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record."). The court stated it would impose the "absolute minimum sentence," and the state recommended a 2.25-year prison term—the minimum term permitted under § 13-702.01(F). The sentencing minute entry thus controls in this instance.

Discussion

¶6 Guarisco asserts the trial court erred by denying her motion to strike the state's allegation of prior convictions for sentence enhancement purposes. Section 13-604(P) requires the state to make any such allegation "in the indictment or information" or

at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings, provided that when the allegation of a prior conviction is filed, the state must make available to the defendant a copy of any material or information obtained concerning the prior conviction.

We review for an abuse of discretion a trial court's decision to permit a prior-conviction allegation made fewer than twenty days before trial. *See State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985).

¶7 Guarisco argues that "constructive notice" of the state's intent to allege prior convictions, based on the discussions at the settlement conference, is insufficient under § 13-604(P), and she therefore "was not properly on notice that the State would in fact seek enhancement of her conviction if she went to trial." This argument is perplexing. As Guarisco acknowledges, she had received the state's formal prior-conviction allegation eighteen days before trial. And Guarisco does not argue the allegation was insufficient on its face to give her notice of the state's intent. She only asserts the notice was untimely. Section 13-604(P) permits a trial court to accept a prior-conviction allegation made less than twenty days before trial unless it finds the defendant

would be prejudiced by the late filing. Thus, the trial court's denial of Guarisco's motion to strike was not based upon a conclusion the discussions at the settlement conference met the requirements of § 13-604(P), but instead upon a conclusion she had not been prejudiced by the fact that the state's allegation had been made less than twenty days before trial. Accordingly, we need not address her argument that constructive notice of the state's intent to seek sentence enhancement under § 13-604(P) is insufficient.

¶8 As the trial court noted, the state alleged the prior convictions only two days after the twenty-day deadline. Guarisco does not explain how this slight tardiness prejudiced her, nor is any prejudice apparent from the record. Additionally, we find no error in the court's conclusion that the settlement conference discussions provided Guarisco sufficient notice of the state's intent, thereby diminishing any theoretical prejudice. If the state seeks an enhanced sentence based on prior convictions during unsuccessful plea negotiations, it is reasonable to anticipate the state would seek the same enhancement at a later trial.

¶9 As we understand her argument, Guarisco instead asserts she was prejudiced because she “could have exercised her right to enter a guilty . . . plea” “without admitting an allegation of prior convictions” at any time before the state filed the prior-conviction allegation because it had not made that allegation in the indictment.³

³Guarisco additionally suggests her trial strategy might have been different had the state's allegation been filed twenty days or more before trial, but offers no further explanation. Accordingly, we do not address this argument. *See State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (defendant waives improperly developed argument).

As discussed, however, the state is permitted by statute to file such an allegation well after filing an indictment. For this reason, that a defendant might have foreclosed that allegation by entering a prompt guilty plea to the indictment plainly is not the type of prejudice that statute contemplates. *See* § 13-604(P). Were we to conclude otherwise, a defendant would be deemed to have suffered prejudice whenever the state did not allege enhancement in the indictment, rendering meaningless the portion of § 13-604(P) permitting post-indictment allegations. *See Mejak v. Granville*, 212 Ariz. 555, ¶ 9, 136 P.3d 874, 876 (2006) (“We must interpret [a] statute so that no provision is rendered meaningless, insignificant, or void.”). The trial court therefore neither erred in finding Guarisco had not been prejudiced by the state’s allegation of prior convictions made eighteen days before trial nor abused its discretion in denying her motion to strike.

¶10 Guarisco also contends the state untimely disclosed proof of her prior convictions. As noted above, Guarisco renewed her motion to strike the state’s allegation on this basis, but stipulated to two of the convictions before the trial court ruled on her motion. Because she did not ask the trial court to rule on her renewed motion before agreeing to the stipulation, she has waived any objection to the state’s purportedly late disclosure,⁴ and we do not address this argument further. *See State v. Lujan*, 136 Ariz.

⁴Guarisco suggests we should not find she has waived this argument because the trial court “undoubtedly” would have allowed the state to present the evidence at a trial on her prior convictions. But it would be improper for us to speculate how the court would have ruled had Guarisco not abandoned her renewed motion to strike.

326, 328, 666 P.2d 71, 73 (1983) (error waived if appellant fails to bring pending motions to trial court's attention and obtain record of rulings).

Disposition

¶11 We affirm Guarisco's conviction and sentence for third-degree escape.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge